IN THE

Supreme Court of the United States

October Term, 1974

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM
AND
BRIEF OF APPELLEES, CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. AND FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated

WELLES V. MOOT,
and
JOHN J. PHELAN,
2300 Erie County Savings Bank Building,
Two Main Place,
Buffalo, New York,
for
MOOT, SPRAGUE, MARCY, LANDY, FERNBACH & SMYTHE,
Buffalo, New York,
Attorneys for Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
23 CENTER ST., BATAVIA, N. Y. 14020
716-343-8457

INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States

October Term, 1974
No. .....

TOWN OF LOCKPORT, NEW YORK, and FLOYD SMITH, Individually and as Supervisor of the Town of Lockport,

Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York, and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Appellees.

Appeal From A Three Judge Court Of The United States District Court for The Western District of New York

MOTION TO AFFIRM

Appellees, Citizens for Community Action at the Local Level, Inc., (hereinafter referred to as appellee CALL) and Francis W. Shedd, pursuant to Rule 16 Subd. 1(d) of the Rules of the Supreme Court move to affirm the judgment of the District Court granted December 10, 1975,

which reinstated the judgment of January 9, 1975 and amended it to adjudge the 1974 County Charter to be in full force and effect and granted additional relief, on the ground that the decision of the District Court is so obviously correct under the principles established by this Court as to warrant no further review by this Court.

BRIEF OF APPELLEES

Opinion Below

The opinion of the District Court for the Western District of New York dated October 23, 1975 that the judgment of January 9, 1975 should be reinstated and amended appears as appendix 1, pages 1a-7a in the Jurisdictional Statement filed in February, 1976. The opinion declaring the constitutional rights of the plaintiffs-appellees is contained in Appendix A, pp. 1a-17a in the original Jurisdictional Statement and is reported at 386 F.Supp. 1.

Jurisdiction

The jurisdictional requisites are adequately set forth in the appellants' Jurisdictional Statement.

Constitutional and Statutory Provisions Involved

The Jurisdictional Statement sets forth the Constitutional and Statutory Provisions Involved.

Questions Presented

The principal question on this appeal is the one man—one vote question which is set forth in the plaintiffs-appellees' motion to affirm and brief filed in May 1975 (p. 2). An additional question presented as a result of the

vacatur and remand by this Court and the reinstatement and amendment of the judgment by the District Court is:

> Did the District Court have the authority to give the 1974 Charter force and effect, pursuant to the direction of this Court to reconsider the case in light of the 1974 Charter, or in accordance with equitable principles, to implement voting rights in light of local conditions.

Statement of Case

The statement of case contained in the motion to affirm and brief of appellees CALL and Shedd of May, 1975 is incorporated herein.

On October 6, 1975 this Court vacated the judgment and returned the case to the District Court for reconsideration in light of the 1974 Charter.

The District Court heard oral argument of counsel, received the 1974 Charter as an exhibit and found as a fact that the 1972 and 1974 Charters were similar and that each Charter was approved by a majority of the voters of Niagara County, with a majority of city voters but a minority in the rural areas. The Court then reinstated the previous judgment and gave the 1974 Charter force and effect as the form of local government for Niagara County.

The appellants make factual allegations in the Statement of Case which we believe are irrelevant as well as erroneous, but we hesitate to leave such allegations unanswered. For that reason, we comment on them in the same position in this brief.

The appellants contend that prior to entry of the January 9, 1975 judgment, the District Court refused to apply

the declaration of constitutional rights to the 1974 Charter. This contention is found throughout the Jurisdictional Statement of February, 1976 (PP. 4, 6, 8 & 9). It is not true. The Niagara County Attorney in a letter in December, 1974 (Appendix A) requested a stipulation to incorporate the 1974 Charter into the judgment. The plaintiff class of voters agreed. The New York Attorney-General declined to stipulate. The matter was never the subject of a proper application to the District Court. The District Court made no determination as to the 1974 Charter at that time or any other time prior to the decision of October 23, 1975.

In addition, the appellants repeatedly contend (Jurisdictional Statement PP. 7, 8, 9) that the plaintiffs-appellees conceded that the complaint required amendment to authorize implementation of the 1974 Charter. That allegation is not true.

The plaintiffs-appellees urged the District Court to adopt one of three alternative methods to protect the voters' constitutional rights; (a) order the implementation of the 1974 Charter in the exercise of its equitable power; (b) order the implementation of the 1972 Charter and with the 1974 Charter voluntarily certified by the New York Secretary of State and the Niagara County Clerk, the superseding clause of the 1974 Charter would give the 1974 Charter force and effect; (c) amend the complaint to set forth an additional cause of action to enjoin implementation of the 1974 Charter and re-litigate the suit from the pleading stage.

The District Court decided that neither course of action was necessary since the 1974 Charter was already part of the record in this case, and this Court had specifically directed the District Court to consider the 1974 Charter.

The motion of the plaintiffs to amend the complaint was therefore denied. The appellants, however, did not appeal such denial of the motion of the plaintiffs-appellees by the District Court.

I

The District Court gave expression to the equal suffrage rights of the voters of Niagara County by implementing the 1974 Charter.

The decision of the District Court to implement the 1974 Charter, upon finding that the same constitutional issues were involved and the Charters were substantially similar is reasonable and is an exercise of the equitable power to grant relief which is given to District Courts in cases of this nature.

The power is derived from Rule 54(c) FRCP which provides "that every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The District Court had broad discretion in framing the equitable decree to apply the constitutional principle to the 1974 County Charter in accordance with the FRCP. *6 Moore's Federal Practice*, §§ 54.60-54.62.

Once a constitutional right and a violation have been shown, the scope of the District Court's power to remedy the wrong is broad, for breadth and flexibility are inherent in equitable remedies. *Swann vs. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276 (1971).

In *The Hecht Co. vs. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 592 (1944) this Court stated:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

The application of equity principles in equal suffrage cases was recognized at the outset of the judicial enforcement of such rights.

Baker vs. Carr, 369 U.S. 186, 250; 82 S.Ct. 691, 727 (1962) referred to the question:

> The justifiability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity.

In *Reynolds vs. Sims,* 377 U.S. 533, 585; 84 S.Ct. 1363, 1393 (1964), it is stated:

> Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions.

II

There was no appeal from that portion of the order and judgment of the District Court denying the motion to amend the complaint to include the 1974 Charter. The judgment of the District Court on that question should be final.

The last paragraph of the amended judgment of the District Court, which denied the motion to amend the complaint to include the 1974 Charter, was not appealed from.

The appellant was apparently attempting to raise the issue of subject matter jurisdiction in this Court (Point II of the Jurisdictional Statement) without a review of the decision of the District Court to deny such motion.

We submit that the failure of the appellant to appeal from the District Court's order on the question of the necessity for an amendment of the complaint precludes any further review of that question.

III

This case is not moot.

The 1974 County Charter which went into effect on January 1, 1976 and the Niagara County Executive who took office on that date are dependent for their continued existence upon an affirmance by this Court. A case or controversy under Article III of the United States Constitution exists.

Article 9 §1(h)(1)of the New York Constitution which the District Court has found to violate the right of equal suffrage guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution is still contained in the New York Constitution. The violation of equal suffrage rights which the District Court has undertaken to declare is capable of repetition. *Moore vs. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493 (1969); *United States vs. W.T. Grant & Co.,* 345 U.S. 629, 73 S.Ct. 894 (1953); *Aetna Life Insurance Co. vs. Hawarth,* 300 U.S. 227, 240-241, 57 S.Ct. 461 (1937).

IV

The attempt by the intervenor appellants to create a collateral issue by challenging the stay of the state court proceeding should be disregarded.

This federal court action involving a fundamental federal constitutional issue had been tried to judgment in District Court with the aggrieved voters the principal

protagonists, six months before the state court action was commenced by the appellants and in which state proceeding, the aggrieved class of voters were not made parties.

Further, the intervenor appellants were permitted to intervene after judgment in the District Court because they claimed they would seek a determination in this Court of the fundamental constitutional issue.

28 USC § 2283 was designed to prevent unseemly and unnecessary conflicts between state and federal courts and for comity in a proper case. *NLRB vs. Nash-Finch Company,* 404 U.S. 138, 146, 92 S.Ct. 373, 378 (1971). The state court judge reached his decision by relying totally upon the District Court decision in this case. This is a proper case when a stay pursuant to 28 USC § 2283 is appropriate until this Court determines the merits of this Fourteenth Amendment question.

Conclusion

The decision of the three-judge District Court applied fundamental principles of equal suffrage to a state's classification of voters into voting units of unequal population, based upon place of residence, within the geographic area of a unit of local government having general governmental powers. There was no evidence in the case of the necessity or justification for the creation of such voting units within the geographic area in which the election franchise was granted.

The decree of the District Court giving the 1974 Charter full force and effect as the instrument defining the form of local government for Niagara County is the most effective implementation of the voters' expression of their rights of equal suffrage under the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The judgment of the District Court as reinstated and amended should be affirmed without plenary consideration.

Respectfully submitted,

WELLES V. MOOT, ESQ.,
and
JOHN J. PHELAN, ESQ.,
Attorneys for Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

April, 1976.

APPENDIX A

Letter of Niagara County Attorney to District Court prior to judgment of 1-9-75.

December 10, 1974

Honorable John T. Curtin
United States District Judge
United States District Court
Western District of New York
United States Courthouse
Niagara Square
Buffalo, New York 14202

Re: Citizens For Community Action At The Local Level, Inc. et al vs. John J. Ghezzi, Secretary of State of the State of New York, et al, CIV-1973-222

Dear Judge Curtin:

This letter is to set forth the position of the County of Niagara in the matter of settling the order in this action. Enclosed is a certification of our Board of Elections showing that a charter was passed at the general election in 1974, and a copy of the Local Law with the certification of the Clerk of the Legislature and the County Attorney. The Local Law is the text of the charter passed in 1974. Also enclosed is a copy of the letter from the Secretary of State rejecting the filing of said 1974 charter.

We feel it would save much time, effort and money if the adjudgment of the Court could be amended to include the 1974 charter, allowing the State Attorney General's office to appeal from the 1972 charter passage and the 1974 charter passage. The 1974 charter contains a provi-

sion which indicates that it supercedes any and all other prior charters (see Article I, Section 101, 1974 charter).

I would suggest the Court could take judicial notice of the documents we now submit. It is also a possibility that we could proceed by way of stipulation. I will ask the other attorneys to stipulate to this method of entering judgment.

Very truly yours,

SAMUEL L. TAVANO,
County Attorney,

MILES A. LANCE,
Assistant County Attorney.

MAL:mlc

cc: John J. Phelan, Esq.,
Michael G. Wolfgang, Esq.

Enc.